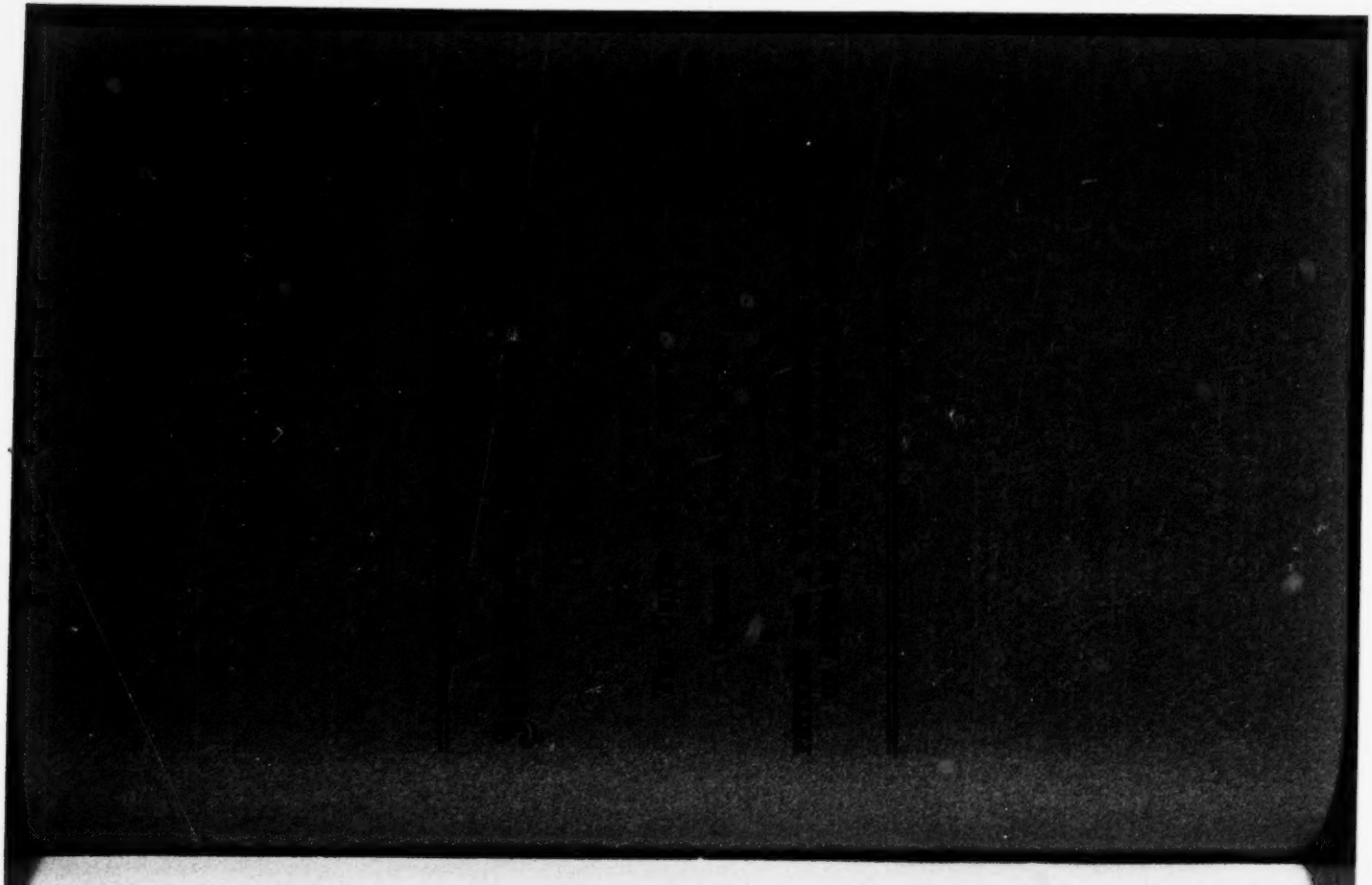

In the Supreme Court of the United States

OCTOBER TERM, 1904.

THE UNITED STATES, PETITIONER,
v.
GEORGE E. CADARR ET AL. } No. ——.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

The Solicitor-General, on behalf of the United States, respectfully prays for a writ of certiorari to review the judgment of the Court of Appeals of the District of Columbia in the above-entitled case.

STATEMENT.

The Code of Law for the District of Columbia enacted by Congress March 3, 1901, and which took effect January 1, 1902 (31 Stat., 1189, 1341), provides

> SEC. 939. ABANDONMENT OF PROSECUTION. If any person charged with a criminal offense shall have been committed or held to bail to await the action of the grand jury, and within nine months thereafter the grand jury shall not have taken action on the case, either by ignoring the charge or by returning an indictment into the proper court, the prosecution of such

charge shall be deemed to have been abandoned, and the accused shall be set free or his bail discharged, as the case may be: *Provided, however*, That the supreme court of the District of Columbia, holding a special term as a criminal court, or, in vacation, any justice of said court, upon good cause shown in writing, and, when practicable, upon due notice to the accused, may from time to time enlarge the time for the taking action in such case of the grand jury.

On April 25, 1901, Cadarr and the other respondents, three in number, were arrested upon a charge of conspiracy to defraud, laid on the 22d of that month, and held to await the action of the grand jury. Thereafter, between April 27 and May 7, 1901, they were released on bail. On March 31, 1902, the grand jury returned an indictment against them for the offense stated. At the trial of the case in the Supreme Court of the District of Columbia all the defendants pleaded not guilty, but afterwards one of them, Parker, obtained leave to withdraw his plea and filed a motion to quash the indictment, on the ground that it was not found within nine months after his holding to bail. Parker's motion to quash was sustained and his bail discharged, and it was further ordered that all the defendants go without day.

Upon appeal by the United States, the Court of Appeals sustained the action of the lower court.

It is to be observed that the appeal of the Govern-

ment was authorized by section 935 of the District Code (31 Stat., 1341), which provides:

> SEC. 935. APPEALS BY UNITED STATES AND DISTRICT OF COLUMBIA. In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal that is given to the defendant, including the right to a bill of exceptions: *Provided*, That if on such appeal it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside.

In view of this provision, the propriety of issuing a writ of certiorari to the Court of Appeals in this case can not be questioned on account of its criminal nature. An appeal by the Government in a criminal case now stands upon the same footing as all other appeals in the Court of Appeals, except that when there has been a verdict of the jury in favor of the defendant it can not be set aside for errors in the rulings of the trial court. The Court of Appeals so ruled in this case. The case may therefore be properly brought here under the following section of the Code:

> SEC. 234. In any case heretofore made final in the Court of Appeals it shall be competent for the Supreme Court of the United States to require, by certiorari or otherwise, any such case to be certified to said Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to said Supreme Court.

The Court of Appeals held—

1. That section 939 applied to proceedings pending when the Code went into effect.

2. That the discharge of an accused under the provisions of that section relieves him from further accountability for the offense, and not merely from the pending prosecution. In other words, that the non-action of the grand jury within nine months after his arrest or commitment to bail operates as an acquittal and bars further prosecution.

Several important prosecutions pending at the time the Code took effect will be affected by the first ruling. But the materiality of the first ruling depends upon the correctness of the second, since if the discharge of the accused under section 939 be not, as the Court of Appeals held, from the offense and final, but only from imprisonment or bail, they may still be indicted and tried, the period of limitation in this and the other cases referred to not having elapsed. Hence it is upon the gravity and manifest error of the second ruling, which will apply as well to all future cases, that the Government relies to obtain the writ prayed.

It is obvious that the latter ruling will seriously imperil the administration of criminal justice in this District. It means that the period of limitation in respect of crimes has been changed by the Code from three years, as provided by section 1044 of the Revised Statutes of the United States (which section is continued in force by section 1 of the Code), to nine

months, whenever the accused shall have been committed or held to bail; and this, although there is no suggestion whatever in section 939 that it was intended as a new statute of limitations.

ARGUMENT.

The plain import of section 939 is that it was intended merely to limit the time that any person charged with a criminal offense might be committed or held to bail pending the action of the grand jury. The statute does not say that if the grand jury fail to take action within nine months after the accused is committed or held to bail he shall be discharged of the *offense*, but that he "shall be *set free* or his bail discharged."

The Court of Appeals argues that unless the statute be construed to mean that the accused shall be finally discharged of the offense, the legislation of Congress is void of effect. Thus, it says:

> According to the common law, cases ignored and cases indicted are both subject to new inquisition and further indictment by grand jury, and such is the situation in which are left the cases exempted from the operation of the statute at bar.
>
> Now it occurs to us that if the second meaning be assigned the statute—we mean that construction which permits future indictment after nine months of the cases operated upon by the statute, as well as those not operated upon—we shall behold upon the part of Congress a painstaking discrimination of all criminal charges

> into two classes, one wherein action is had within nine months; the other, no action within nine months; one class exempted from the operation of the statute and left so that indictment may be had after nine months, according to the common law; the other class within the operation of the statute, and yet with but the same result that in this class, too, indictment may be had after nine months; a division into classes for the purpose of legislation; an exemption of one class from the legislation; legislation for the other class, and yet the law turns out the same for both. The law for the class legislated upon remains the same as the law for the class not legislated upon, legislation had, but the law upon the point of the legislation remains the same as it was before legislation, but no change in the law.

The fallacy of this reasoning lies in the fact that the court assumed it was the intention of Congress by the statute in question to limit the time in which an indictment might be found—the very point in issue—whereas the manifest intention was simply to limit the time the accused might be committed or held to bail pending the action of the grand jury. The statute says he shall not be so committed or held for a longer period than nine months. This was a vital change in the existing law, which made no limitation upon the time an accused might be committed or held to bail pending the action of the grand jury, and relieves the construction contended for by the Government of the charge of futility.

In support of the proposition that the discharge contemplated by the statute was from the offense and final, the Court of Appeals further said:

> It is provided in the section that the criminal term of the Supreme Court of the District, or in vacation of any of its justices, "upon good cause shown in writing, may from time to time enlarge the time for taking action in such case by the grand jury."
>
> If the second meaning be attached to the statute, to wit, that the discharge is only from the pending prosecution, this proviso turns out not only unnecessary, but idle and useless; for if the discharge is only from the pending accusation this leaves the grand jury already free to indict at a later period, because, according to the construction it has never been deprived of that power. There is neither need nor reason for vesting in the court power to extend the time for action if action may be had independent of any extention; the fact that power to extend the time for action is conferred, and is to be granted only "upon good cause shown in writing," shows the legislative mind to have understood that unless there was extension, the time for action has finally expired with the nine months.

Here again the court proceeds upon the assumption that Congress intended to limit the time in which an indictment be found, instead of the time the accused might be committed or held to bail pending the finding of an indictment. The manifest purpose of the proviso to section 939 is to afford the Government an opportunity to enlarge the time the accused might be

committed or held to bail pending the action of the grand jury, not the time in which it might procure an indictment. If the grand jury fail to take action within nine months, and the time for taking such action be not enlarged as prescribed, *then the accused is to be set free* or his bail discharged—and that is as far as the statute pretends to go. It is absolutely silent as to the finding of an indictment after such release or discharge.

The Court of Appeals further suggests that if the discharge of the accused under section 939 be not from the offense and final, nothing will be accomplished thereby, as he may be immediately rearrested. This by no means follows, and even if it did, that fact would not be conclusive. It may be said that, since the statute plainly intends that a person shall not be committed or held to bail, pending the action of the grand jury, for a longer period than nine months, unless the time shall be enlarged as stated, if discharged under that section after the statutory period has elapsed he could not be rearrested unless the grand jury had, in the meantime, taken action by finding an indictment against him. But the purpose of the statute is simply to prevent undue encroachment upon the liberty of the citizen when charged with crime, not to free him from all accountability therefor.

THE AUTHORITIES—FURTHER PROSECUTION.

It will be observed that the Court of Appeals cites no authorities whatever in support of its view that the discharge of a person committed or held to bail under section 939 is from the offense and final. Statutes similar

to section 939 exist in many of the States. Some of them provide, in express terms, that by reason of a failure to prosecute within a specified time, the accused shall be discharged of the offense. Thus the Georgia statute provides that he "*shall be absolutely discharged* and acquitted of the offense charged in the indictment;" the statutes of other States that "he shall be discharged so far as relates to the offense for which he was committed." Such expressions have very properly been held to amount to an acquittal and bar further prosecution.

Jackson v. *State*, 76 Ga., 551, 565.
Stewart v. *State*, 13 Ark., 720, 730.
Johnson v. *State*, 42 Ohio St., 209.
State v. *Wear*, 145 Mo., 162.

But in no case—except an Indiana decision (*McGuire* v. *Wallace*, 109 Ind., 284, 289), where the court followed the Ohio cases without adverting to the material difference in the language of the Ohio statute—has it been held that a simple direction that the accused "shall be discharged" operates as an acquittal and bars further prosecution.

In the Missouri case above cited the court calls attention to the marked difference between the New Jersey statute, which merely provides that the defendant "shall be discharged," and the Missouri statute, which provides that he shall be "entitled to be discharged *so far as relates to such offense*," observing that the New Jersey statute "intends only a simple discharge without any finality to it."

State v. *Wear*, 145 Mo., 189.

A like observation, in reference to the decisions under the Illinois and Colorado statutes, was made in—

In re Edwards, 35 Kans., 103.

In New Jersey it is settled that its statute, referred to in *State* v. *Wear*, *supra*, merely imports release from imprisonment and not immunity from further proceedings.

State v. *Garthwaite*, 23 N. J. L., 143.
Apgar v. *Woolston*, 43 N. J. L., 57, 66.

Such is also the rule of decision in other States having similar statutes.

Waller v. *Com'th.*, 84 Va., 492, 494.
Byrd v. *State*, 1 How. (Miss.), 163, 171.
In re Bergerow, 133 Cal., 349; 136 id., 293.
State v. *Fley*, 2 Brevard, 338; approved in *State* v. *Williams*, 35 S. C., 163.

It is to be observed that the language of the District Code is not that the accused "shall be discharged," but merely that he "shall be SET AT LIBERTY *or his bail discharged, as the case may be." There is even less ground for holding that this language was intended to operate as a discharge of the offense.*

In Colorado the statutory provision is precisely the same as section 939—that the accused "shall be set at liberty." This has been held to operate merely to set the prisoner at liberty, and not to work a discharge of the offense, the court noting a distinction between such language and that used in the statutes which are held to make discharge equivalent to an acquittal.

In re Garvey, 7 Col., 509.

SUBSEQUENT ARREST.

As already stated, it may be said that a person set free or whose bail was discharged under section 939 can not be rearrested and committed or held to bail for the same offense until an indictment had been found against him. But, even if it were otherwise, that fact would not justify a different construction from that contended for by the Government. It has never been held that the discharge of a person from one confinement, which was originally or had become illegal, precludes a second or a third arrest for the same cause.

Taking the rule upon *habeas corpus* as an illustration, we find that one discharged from imprisonment thereunder may be immediately rearrested for the same offense upon new process issued by a court of competent jurisdiction. Thus section 6 of the *habeas corpus* act of 31 Charles II provides:

> That no person or persons which shall be delivered or set at large upon any *habeas corpus* shall at any time hereafter be again imprisoned or committed for the same offense by any person or persons whatsoever, other than by the legal order and process of such court wherein he or they shall be bound by recognizance to appear, or other court having jurisdiction of the cause.
>
> *Attorney-General* v. *Kwok-a-Sing*, L. R., 5 P. C., 179, 201–2.

In *Ex parte Milburn* (9 Pet., 709) Mr. Justice Story said:

> A discharge of a party, under a writ of *habeas corpus*, from the process under which he is im-

prisoned, discharges him from any further confinement under that process; but not under any other process which may be issued against him under the same indictment.

One held under an illegal sentence is entitled to be released on *habeas corpus*, but he may be at once retaken and held for a new sentence.

In re Bonner, 151 U. S., 242.

Nor does a discharge on *habeas corpus* preclude an investigation by the grand jury; release from imprisonment does not wipe out the offense.

2 Spelling, Extraordinary Relief, sec. 1227.

ABANDONMENT OF PROSECUTION.

The fact that section 939 says that "the prosecution of the *charge* shall be deemed to have been abandoned," furnishes no argument in support of the contention that a discharge under that section bars further prosecution of the *offense*. It has never been held that the mere abandonment of a prosecution by the State bars further prosecution of the offense. Even a formal *nolle prosequi* leaves the accused liable to fresh indictment and to all the consequences of his offense as if there had been no abortive prosecution.

1 Chitty Crim. Law, 480.
1 Bishop Crim. Proc. (3d ed.), sec. 1395.
Goddard v. *Smith*, 6 Modern, 262.
Dealy v. *United States*, 152 U. S., 542.

The statute merely makes the presumptive abandonment of the particular charge upon which the party

was arrested, by reason of the non-action of the grand jury within the prescribed time, the ground for his being set free or his bail discharged. The particular charge having been abandoned, or presumptively abandoned, there is no longer any reason or justification for his being committed or held to bail. But that is very far from saying there is no longer any reason for his being prosecuted for the offense that he may have committed and that such release or discharge operates as an acquittal.

ABANDONMENT CAN NOT BE PLEADED AFTER INDICTMENT

The Government also contends that after an indictment has been found it is too late for the accused to plead an abandonment of the prosecution under section 939. The purpose of the statute being merely to prevent his being committed or held to bail pending the action of the grand jury for an undue length of time, and not to defeat indictment, but rather to promote it, his failure to take advantage of the statute and obtain his release before an indictment is found leaves him without any further right in the premises. He has nothing to complain of, since his right to be released has been lost through his own laches.

It is respectfully submitted that in view of the gravity of the case and the manifest error committed by the Court of Appeals, the writ prayed should issue.

HENRY M. HOYT,
Solicitor-General.

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